



Paper No. 6

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OFFICE OF PETITIONS

In re Application of
Edward L. Simonds
Application No. 09/639,198
Received: August 15, 2000
Title: Combustion Heater

DECISION ON PETITION

This is a decision on the "Request for Review of Notification Pursuant to 37 C.F.R. 1.53(e)(2)," filed October 15, 2002. This decision is also considered in light of the petition under § 1.53(e)(2), as filed April 16, 2001 (resubmitted October 15, 2002).

The application was deposited on August 16, 2000. However, on April 2, 2001, the Office mailed a "Notice of Incomplete Nonprovisional Application" stating that the application had not been accorded a filing date because the application was deposited without drawings.

Petitioner asserts that they timely responded filing a petition under § 1.53(e)(2) on April 11, 2001. In support thereof, petitioner submitted a copy of their return postcard receipt. This postcard itemizes a request for review of notification among the enclosures and bears an OIPE date stamp of April 16, 2001. In consideration of this evidence, it is concluded that petitioner has shown that the petition was timely filed, but misplaced in the Office.

On August 22, 2002, the Office mailed another "Notice of Incomplete Nonprovisional Application" stating that the application had not been accorded a filing date because the application was deposited without drawings. In response, applicant timely filed the instant petition, asserting that the drawings were included with the documents originally filed with the USPTO on August 15, 2000. The petition includes a copy of these drawings.

The filing date of an application shall be the date on which the specification and any required drawing are received in the Patent and Trademark Office. 35 U.S.C. 111(a)(4).

Petitioner's arguments and evidence have been considered, but not found persuasive that the application as filed on August 15, 2000 included drawings. On petition originally filed April 16, 2001, registered patent attorney Brett J. Trout submits that he personally observed the drawings being included with the application as filed on August 15, 2000. The petition further includes the declaration of legal assistant Sharon K. Janes, swearing under penalty of perjury, that the informal drawings were submitted with the application on August 15, 2000. Petitioner has not submitted evidence such as an itemized return postcard receipt showing that drawings were among the papers filed on August 15, 2000.

The PTO file is the official record of the papers originally filed in this application. A review of the official file reveals that no drawings were filed on August 15, 2000, since no drawings are present in the file. The file includes a paper prepared by PTO staff stating

¹ The record does not make clear what precipitated the mailing of this Notice with a new date for reply.

that upon the scanning of the application, the application was deficient, in that, no drawings were present. An applicant alleging that a paper was filed in the PTO and later misplaced has the burden of proving the allegation by a preponderance of the evidence. Petitioner has not met this burden. The petition is supported only by the declarations of attorney Trout and legal assistant Janes, which recall routine events occurring eight months prior. These declarations are not specific and are not supported by evidence contemporaneous with the original compilation of the application papers. As such, these declarations are not more persuasive than the record of what was filed as shown by the official file.

Accordingly, at this time, the petition must be **DISMISSED**. The petition fee is not being refunded.

Applicant may only be accorded a later filing date as of the date of receipt of the drawings. The drawings were first received on petition filed October 15, 2002.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from the mail date of this decision. Extensions of time under § 1.136(a) are not permitted. See § 1.181(f).

This application is being forwarded to the Office of Initial Patent Examination (OIPE) for according of a filing date of October 15, 2002, using the application papers received in the Office on August 15, 2000 and the three (3) sheets of drawings (Figs. 1-4) supplied on petition filed October 15, 2002.

Telephone inquiries specific to this decision should be directed to Petitions Attorney Nancy Johnson at (703) 305-0309.



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